

18. The system of claim 12, wherein the plurality of bins are one set of bins of a plurality of sets of bins, wherein each set of bins is formed from one dimension of elements of a two dimensional array, the logic for scaling comprises:

logic for incrementing an index to point to a subsequent set of bins in the two dimensional array; and

logic for multiplying the current range and the size of the portions by a factor.

19. The system of claim 18, further comprising:

logic for receiving a subsequent data value;

logic for determining whether the subsequent data value is within the factored range;

logic for incrementing the number of a particular bin of the plurality of bins, if the subsequent data value is within the factored range, wherein the particular bin is selected based on the subsequent data value;

logic for storing the subsequent data value in the array, if the subsequent data value is not within the factored range; and

logic for scaling the factored range and the size of the factored portions, if the subsequent data value is not within the factored range.

20. The system of claim 19, further comprising:

logic for re-calculating the numbers of the plurality of bins according to the scaled size of the factored portions.

### **REMARKS/ARGUMENTS**

Applicant hereby traverses the outstanding rejection, and requests reconsideration and withdrawal in light of the remarks contained herein. Claims 1-20 are pending in this application.

#### **New Title**

The title of the invention has been deemed to be not descriptive of the invention. In response, Applicant has changed the title to be descriptive of the invention as defined in the

claims. No new matter has been entered. Thus, Applicant believes that the new title should satisfy the requirements of the Office Action.

**Rejection of claims 1-4, 10, 12-14 and 19 under 35 U.S.C. § 103**

Claims 1-4, 10, 12-14 and 19 are rejected under 35 U.S.C. §103(a) as being unpatentable over Baker et al. ('118, hereinafter Baker) in view of de Vries ('168).

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art cited must teach or suggest all the claim limitations. See M.P.E.P. §2143. Without conceding the second criteria, Applicant asserts that the rejection does not satisfy the first and third criteria.

**The Office Action does not provide the requisite motivation.**

The Office Action admits that Baker does not teach adjusting or scaling the ranges in a histogram. The Office Action attempts to cure this deficiency by introducing de Vries, which the Office Action alleges to teach having such an element. The motivation for making the combination was presented as follows:

“Thus, it would have obvious ... to incorporate various data divisions as taught in de Vries into the data system described in the Baker patent because Baker operates with graphical data and de Vries suggests that data can be stored, manipulated and displayed in various known ways.”

It is well settled that the fact that references can be combined or modified is not sufficient to establish a prima facie case of obviousness, M.P.E.P. §2143.01. Applicant respectfully asserts that Baker already stores, manipulates and displays data in various known ways. For example, Figure 5 of Baker depicts the retrieval from storage, manipulation and display of data. Thus, the recited motivation does not provide a desirable reason to combine the teachings of de Vries with the teachings of Baker. Consequently, the provided motivation

is merely a statement that the reference can be modified, and does not state any desirability for making the modification. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In re Mills, 916 F.2d 680, 16 USPQ.2d 1430 (Fed. Cir. 1990), as cited in M.P.E.P. §2143.01. Thus, the motivation provided by the Examiner is improper, as the motivation must establish the desirability for making the modification.

No valid suggestion has been made as to why a combination of Baker and de Vries is desirable. Therefore, the rejection of claims 1-4, 10, 12-14 and 19 should be withdrawn.

**The recited combination does not teach or suggest all claimed limitations.**

The Office Action admits that Baker does not teach adjusting or scaling the ranges in a histogram. The Office Action attempts to cure this deficiency by introducing de Vries, which the Office Action alleges to teach having such an element. However, this combination, as presented, does not teach or suggest all limitations of the claimed invention.

Claim 1 recites, in part, "...receiving a data value; determining whether the data value is within the current range; incrementing the number of a particular bin of the plurality of bins, if the data value is within the current range, wherein the particular bin is selected based on the data value; storing the data value in the array, if the data value is not within the current range; and scaling the current range and the size of the portions, if the data value is not within the current range."

Claim 12 recites, in part, "logic for receiving a data value; logic for determining whether the data value is within the current range; logic for incrementing the number of a particular bin of the plurality of bins, if the data value is within the current range, wherein the particular bin is selected based on the data value; logic for storing the data value in the array, if the data value is not within the current range; and logic for scaling the current range and the size of the portions, if the data value is not within the current range."

The combination of Baker and de Vries does not disclose these limitations. Without conceding the assertions made by the Examiner in the discussion of Baker, Applicant respectfully asserts that de Vries does not teach scaling the current range and the size of the



portions, if the data value is not within the current range. Applicant notes that claims 1 and 12 do not define the word “histogram” as asserted by the Examiner in the rejection. Furthermore, the Examiner suggests that de Vries teaches scaling the ranges in a histogram. This assertion is erroneous. Applicant notes that de Vries teaches the use of a histogram to establish scaled displays in oscilloscopes, and that de Vries does not teach displaying the histogram on the oscilloscope. Thus, the scaling that occurs with the oscilloscope display does not change the scaling of the histogram of de Vries. Therefore, the Applicant respectfully asserts that for the above reasons claims 1 and 12 are patentable over the 35 U.S.C. § 103(a) rejection of record. Additionally, Applicant notes that claims 1 and 12 do not define the word “histogram” as asserted by the Examiner in the rejection.

Claims 2-4, 10, 13-14, and 19 depend directly from base claims 1 and 12, respectively, and thus inherit all limitations of their respective base claims. Each of claims 2-4, 10, 13-14, and 19 sets forth features and limitations not recited by the combination of Baker and de Vries. Thus, the Applicant respectfully asserts that for the above reasons claims 2-4, 10, 13-14, and 19 are patentable over the 35 U.S.C. § 103(a) rejection of record.

**Rejection of claims 5-9, 11, 15-18 and 20 under 35 U.S.C. § 103**

Claims 5-9, 11, 15-18, and 20 are believed to be rejected as being unpatentable over Baker and de Vries in view of Fletcher et al. (‘264, hereinafter Fletcher).


Applicant notes that paragraph 7, in defining the rejection does not list claim 11. However, claim 11 is discussed in paragraph 10. Consequently, Applicant believes that claim 11 should have been included in the statement of paragraph 7.

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art cited must teach or suggest all the claim limitations. See M.P.E.P. §2143. Without conceding the second criteria, Applicant asserts that the rejection does not satisfy the first and third criteria.

**The Office Action does not provide the requisite motivation.**

The Office Action admits that the combination of Baker and de Vries does not teach using data that comprises network delay times for packets. The Office Action attempts to cure this deficiency by introducing Fletcher, which the Office Action alleges to teach having such elements. The motivation for making the combination was presented as follows:

“Thus, it would have obvious ... to incorporate various time delay data as taught in Fletcher into the data system described in the Baker-de Vries combination because Baker-de Vries operates with graphical data and Fletcher suggests that said data can be displayed on a GUI.”

It is well settled that the fact that references can be combined or modified is not sufficient to establish a prima facie case of obviousness, M.P.E.P. §2143.01. Applicant respectfully asserts that Baker already displays data on a GUI. For example, Figure 5 of Baker depicts the data being displayed on a GUI. Thus, the recited motivation does not provide a desirable reason to combine the teachings of Fletcher with the combination of Baker and de Vries. Consequently, the provided motivation is merely a statement that the reference can be modified, and does not state any desirability for making the modification. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. In *re Mills*, 916 F.2d 680, 16 USPQ.2d 1430 (Fed. Cir. 1990), as cited in M.P.E.P. §2143.01. Thus, the motivation provided by the Examiner is improper, as the motivation must establish the desirability for making the modification. 

No valid suggestion has been made as to why a combination of Baker, de Vries, and Fletcher is desirable. Applicant also notes that the motivation provided with respect to this rejection does not overcome the insufficiency of the motivation provided for the rejection of claims 1-4, 10, 12-14 and 19. Therefore, the rejection of claims 5-9, 11, 15-18, and 20.

**The recited combination does not teach or suggest all claimed limitations.**

The Office Action admits that the combination of Baker and de Vries does not teach using data that comprises network delay times for packets. The Office Action attempts to cure this deficiency by introducing Fletcher, which the Office Action alleges to teach having such elements. However, this combination, as presented, does not teach or suggest all limitations of the claimed invention.

The combination of Baker and de Vries does not disclose these limitations of base claims 1 and 12, as discussed above. Fletcher is not relied upon in the Office Action as disclosing these limitations. Therefore, the combination of references does not teach all elements of the claimed invention.

Claims 5-9, 11, 15-18, and 20 depend directly from base claims 1 and 12, respectively, and thus inherit all limitations of their respective base claims. Each of claims 5-9, 11, 15-18, and 20 sets forth features and limitations not recited by the combination of Baker, de Vries, and Fletcher. Thus, the Applicant respectfully asserts that for the above reasons 5-9, 11, 15-18, and 20 are patentable over the 35 U.S.C. § 103(a) rejection of record.

In the rejection of claims 6 and 16, the Office Action states that the Examiner has taken Official Notice. Under Rule 37 C.F.R. §1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. §2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Otherwise the rejection of claims 6 and 16 should be withdrawn.

**Conclusion**

For all the reasons given above, the Applicant submits that the pending claims distinguish over the prior art of record under 35 U.S.C. §103. Accordingly, the Applicant submits that this application is in full condition for allowance.

Applicant respectfully requests that the Examiner call the below listed attorney if the Examiner believes that such a discussion would be helpful in resolving any remaining problems.

Attached hereto is a marked-up version of the changes made to the specification and claims by the current amendment. The attached page is captioned **"Version with markings to show changes made."**

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 50-1078, under Order No. 10981247-1 from which the undersigned is authorized to draw.

I hereby certify that this correspondence is being deposited with the United States Postal Service as Express Mail, EL315115396US, in an envelope addressed to: Commissioner for Patents, Washington, D.C., 20231.

Date of Deposit: 10-28-2002

Typed Name: Rita Carr

Signed: 

Respectfully submitted,

By 

Michael A. Papalas  
Attorney Agent for Applicant(s)  
Reg. No.: 40,381

Date: October 28, 2002

Telephone No. (214) 855-8186

**VERSION WITH MARKINGS TO SHOW CHANGES MADE**

**In the Title**

Please replace the title of the invention with the following:

--METHOD AND SYSTEM FOR MANAGING PERFORMANCE DATA  
ABOUT A NETWORK--

[METHOD AND APPARATUS FOR CREATING REAL-TIME LATENCY GRAPHS]